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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOHN ADAM CHAVEZ,

Petitioner,

vs.

STEFANIE HUMPHREY, *et al.*,

Respondents.

} 3:07-cv-0224-BES-VPC

} ORDER

This action proceeds on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, by petitioner John Chavez. Before the court is respondents' motion to dismiss (docket #11).

I. Procedural History

Petitioner was charged by second amended information with intimidating, threatening, hindering or delaying a witness from reporting a crime (count I), assault with a deadly weapon (count II), driving under the influence (count III), and destruction or injury to property (count IV). Exhibit 25.¹ After a jury trial petitioner was convicted of counts II, III, and IV. Exhibit 43. Sentencing was held on March 10, 2005, and the trial court sentenced petitioner to 72 months in prison, with parole eligibility in 16 months for count II, to 72 months in prison with parole

¹ The exhibits cited in this order are those filed by respondents in support of their motion to dismiss, and are located in the record at docket #12, #13, and #14.

1 eligibility in 16 months for count III, and to 12 months in the county jail for count IV. Exhibit
2 45. Count II and III are to run consecutively to each other. *Id.* A judgment of conviction was
3 entered on that same day. Exhibit 46. Petitioner appealed, and the Nevada Supreme Court
4 affirmed petitioner's convictions. Exhibits 50 and 69. Remittitur issued on February 7, 2006.
5 Exhibit 71.

6 Petitioner filed a state habeas corpus petition on September 13, 2006 (docket #72).
7 The state district court appointed counsel (docket #75). Counsel filed a supplemental petition
8 for writ of habeas corpus (docket #76). The trial court held an evidentiary hearing on the
9 petitioner's claims on July 27, 2007, and then denied the petition (docket #87 and #92).
10 Petitioner appealed to the Nevada Supreme Court (docket #94). There is no indication that
11 the Nevada Supreme Court has decided the appeal.

12 Petitioner submitted a federal habeas corpus petition in this court (docket #9).
13 Respondents have moved to dismiss the petition (docket #11).

14 **II. Discussion**

15 Respondents argue in the motion to dismiss that instant petition for writ of habeas
16 corpus is not properly before this court, as there are ongoing state court proceedings.
17 Respondents contend that none of the claims for relief in the federal habeas petition are
18 exhausted. Respondents ask this court to dismiss the petition as it is premature, in light of the
19 pending state court proceedings.

20 A state prisoner must exhaust all available state remedies prior to filing a federal
21 habeas corpus petition. 28 U.S.C. § 2254(b); *Rose v. Lundy*, 455 U.S. 509 (1982). The state
22 courts must be given a fair opportunity to act on each claim before those claims are presented
23 in a habeas petition to the federal district court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844
24 (1999). Furthermore, a claim will remain unexhausted until a petitioner has sought review from
25 the highest available state court through direct appeal or collateral review proceedings. See
26 *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004).

The Ninth Circuit Court of Appeals has stated that when “an appeal of a state criminal conviction is pending, a would-be habeas corpus petitioner must await the outcome of his appeal before his state remedies are exhausted.” *Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983). Petitioner appealed the state district court’s denial of his habeas corpus petition to the Nevada Supreme Court. As there is no indication that the appeal is completed, and because there are ongoing state court proceedings, this Court must dismiss the petition. Petitioner’s claims are unexhausted.

The court will grant the motion to dismiss the instant federal petition, without prejudice for the petitioner to file another federal petition after his state court proceedings have finished.

IT IS THEREFORE ORDERED that respondents' motion to dismiss (docket #11) is **GRANTED** and the petition is **DISMISSED WITHOUT PREJUDICE**.

IT IS FURTHER ORDERED that the clerk shall **ENTER JUDGMENT ACCORDINGLY.**

DATED this 17th day of December, 2008.


UNITED STATES DISTRICT JUDGE